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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR APPELLANTS

REPLY TO ARGUMENT I OF THE ANSWER BRIEF CONCERNING THE MODELING OF 74 O.S. 1971, SECTION 818, AFTER THE FEDERAL HATCH ACT

Section 818, enacted in 1959, admits of similarities to the Federal Hatch Act prohibitions, but the pertinent portion of the Oklahoma Merit System of Personnel Administration Act is inherently distinguishable from the pertinent portion of the Federal Hatch Act.

It is respectfully urged that *United Public Workers v. Mitchell*, 330 U.S. 75, and *Oklahoma v. Civil Service Commission*, 330 U.S. 327, did not determine the meaning and

effect of the prohibitions in the Federal Hatch Act measured against First Amendment Standards' arguments of vagueness and over-breadth.

The intent of the Oklahoma Legislature to enact the Oklahoma Merit System of Personnel Administration was to correct the evils of the spoils system of government while providing basic standards of competency in filling positions of employment in government, an appropriate, desirable and commendable objective. However, such enactment was not without proscribing certain otherwise lawful conduct of State employees. It is this proscription which is before the Court.

Unnumbered paragraphs six and seven of 74 O.S. 1971, Section 818, are as follows:

“No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

“No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his veto.”

The Oklahoma Statute admittedly restricts State employees' First Amendment rights, but such restrictions are not couched in comprehensible language with reasonably ascertainable standards, nor are such restrictions only imposed as are necessary to protect identifiable and overriding governmental interests.

The State of Oklahoma by statute has cast a pall over the political activities of certain of its employees rendering them politically impotent in derogation of their rights under the First Amendment.

**REPLY TO ARGUMENT II OF THE ANSWER BRIEF
THAT PARAGRAPHS SIX AND SEVEN OF 74 O.S.
1971, SECTION 818, ARE NOT UNCONSTITUTIONAL
ALLY VAGUE AND OVER-BROAD**

The prohibitions set forth in paragraphs six and seven of 74 O.S. 1971, Section 818, *supra*, are worded in generalities that lack precision. There is no standard. One cannot read these paragraphs and ascertain what activities, if any, are permitted and what activities are proscribed.

The appellees suggest that the problem of the Oklahoma statute is one of definition of the words "political" and "politics." Then through tortuosity of legal reasoning, appellees contend that such words connote partisanship. We respectfully disagree with such a conclusion.

In enacting 74 O.S. 1971, Section 818, the Legislature expressly utilized the words "partisan political" in unnumbered paragraph seven. However, this same Legislature purposefully omitted the limiting word "partisan" to modify or explain the word "political" in other parts of paragraphs

six and seven. It is respectfully submitted that the doctrine of *expressio unius est exclusio alterius* negate the contention of definition and meaning suggested by appellees.

If, however, the appellees are correct in their allegations of the definition of the term "political," does not the Oklahoma Statute broadly prohibit State employees from:

- (1) Freely and publicly expressing opinions regarding any political party or any political campaign?
- (2) Taking part in any political campaign?
- (3) Taking part in the management or affairs of any political party?
- (4) Being a candidate for nomination or election to any paid political office?
- (5) Being an officer or member of a committee of a partisan political club?
- (6) Being a member of any national, state or local committee of a political party?
- (7) Being concerned in any manner in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose?

The Oklahoma Statute, paragraphs six and seven, 74 O.S. 1971, Section 818, *supra*, goes far beyond the provisions of the Hatch Act set forth in the Mitchell case, *supra*. The innocuous activity of displaying a partisan political button, badge, auto bumper sticker and the like is considered by the Oklahoma State Personnel Board as a violation of the Statute (App. 29) even though this activity

is more akin to a personal expression of political opinion. In what instances and under what set of circumstances would the proscription of the wearing of a partisan political button, badge or displaying an automobile bumper sticker be connected with a valid State interest to merit constitutional approval. It is respectfully submitted that such connection is tenuous.

Where the activities of a public employee are unrelated to the performance of his duties, such an employee is to be treated for purposes of adjudicating his First Amendment rights as a member of the general public. See *Pickering v. Board of Education*, 391 U.S. 563. If these are permissible areas of activity, the overriding governmental interest must be marked with utmost clarity. See *Grayned v. City of Rockford*, 408 U.S. 104. If it is necessary to impose broad, prophylactic restrictions on First Amendment rights for the purpose of remedying abuses of coercion, intimidation and misuse of official authority, should not the State demonstrate that a less restrictive ban limited to prohibiting the abuses would not suffice to remedy them?

As pointed out in appellants' Brief, numerous governmental statutes and ordinances with political activity prohibition sections have been tested by the courts and have been found wanting in constitutional acceptability because of vagueness and over-breadth. *Fort v. Civil Service Commission*, 38 Cal.Rptr. 625, 392 P.2d 385; *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir., 1971); *DeStefano v. Wilson*, 96 N.J. Super. 592, 122 A.2d 682; *Gray v. City of Toledo*, 323 F.Supp. 1281; *Minnely v. State of Oregon*, 242 Ore. 490, 411 P.2d 69; *Mancuso v. Taft*, 341 F.Supp. 574. It is respectfully submitted that 74 O.S. 1971, Section 818, is not ma-

terially distinguishable from the statutes and ordinances failing the test of vagueness and over-breadth.

**REPLY TO ARGUMENT III OF THE ANSWER BRIEF
THAT APPELLANTS ARE NOT DENIED THE EQUAL
PROTECTION OF THE LAWS**

Appellees indicate that employment by the State may be conditioned upon a reasonable limitation of the privilege of free speech. Appellants contend that the proscriptions imposed by Section 818, *supra*, are constitutionally unacceptable because of vagueness and over-breadth. Therefore, it is appellants' contention that employment by the State may not be conditioned upon the acceptance of the unconstitutional proscriptions contained in Section 818, *supra*.

Section 818, *supra*, facially denies the equal protection of the laws to the class of citizens affected by the Statute and in so doing violates the rights of such citizens under the XIV Amendment.

FURTHER REPLY TO ANSWER BRIEF

Appellees inferentially urge that the heart of the Oklahoma Merit System of Personnel Administration would be excised if the contentions of the appellants are sustained. This is factually inaccurate.

Unnumbered paragraphs one through five and eight of Section 818, as follows, would still be effective:

“§818. Discrimination and other prohibited acts.

“No person in the classified service shall be appointed to, or demoted or dismissed from, any posi-

tion in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

"No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

"No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

"No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose or effecting the rights or prospects of any person with respect to employment in the classified service.

"No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

* * * * *

"Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply."

It is patently clear that a vast number of protections would still be afforded to the employees of the State of Oklahoma under the remaining provisions of Section 818, *supra*.

Appellants are seeking the right to enjoy the warm breezes of First Amendment privileges while protecting themselves from the strong chilling wind of proscription bottomed in the morass of vagueness and over-breadth.

CONCLUSION

In conclusion, appellants respectfully submit that the pertinent portion of the Oklahoma Merit System of Personnel Administration Act is inherently distinguishable from the pertinent portion of the Hatch Act and to the extent it is distinguishable, said Act is sufficiently overbroad and sufficiently vague and the classification sufficiently arbitrary that the same are wanting in constitutional acceptance under the First, Fifth and Fourteenth Amendments of the United States Constitution. Additionally, appellants submit that *Mitchell, supra*, fails to enunciate the current law as said case applies to the First, Fifth and Fourteenth Amendment rights of the plaintiffs in the case at bar.

WHEREFORE, appellants ask this Court to reverse the judgment of the trial court with instructions to enter an order enjoining the appellees from proceeding further in the dismissal actions against the named appellants.

Respectfully submitted,

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March, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

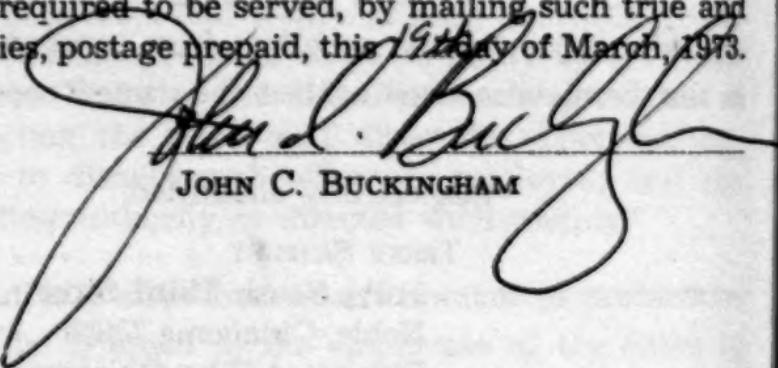
The Honorable Larry Derryberry,
State Attorney General,
State Capitol Building
Oklahoma City, Oklahoma 73105

Keith B. Froscio, Director
State Personnel Board
407 Sequoyah Memorial Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel,
and

Harvey Cody, Conservation Attorney
Oklahoma Corporation Commission
Jim Thorpe Building
Oklahoma City, Oklahoma 73105,

all parties required to be served, by mailing such true and correct copies, postage prepaid, this 19th day of March, 1973.


JOHN C. BUCKINGHAM